

UGANDA / JUDGMENT

Birungi v Uganda (Criminal Appeal 341 of 2016) [2025] UGCA 144 (20 May 2025)

[2025] UGCA 144

COURT

Court of Appeal of Uganda

BEFORE

Kazibwe, JA, Nakachwa, JA/JCC, Kakooza Sabiiti, JA/ JCC

CASE / FILE NUMBER

Criminal Appeal 341 of 2016

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THE REPUBLIC OF UGANDA IN THE COURT OF APPEAL OF UGANDA HOLDEN AT
MBARARA CRIMINAL APPEAL NO.0341 OF 2016

(ARISING FROM MBARARA CRIMINAL SESSION CASE NO.410 OF
\$2016)\$

(CORAM: Moses Kazibwe Kawumi, Florence Nakachwa, Cornelia Kakooza Sabiiti JJA)

BETWEEN

BIRUNGI VICENT

APPELLANT

AND

UGANDA

RESPONDENT

(Appeal from Judgment of the High Court at Mbarara by Honourable Justice David Matovu delivered on 2nd November, 2016)

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JUDGMENT OF THE COURT

Background

The Appellant was indicted and convicted of the offence of Rape contrary to Sections 123 and 124 of the Penal Code Act Cap 120 and was sentenced to 20 years and 2 months' imprisonment.

The facts upon which the appellant was convicted are that Tugumisirize Rossete 25 Bigombe (the complainant) was a widow resident of Rwenanura cell in Isingiro District. Birungi Vicent (the accused) was a resident of the same village. During the night of the 11th December 2011, the complainant, Tugumisirize Rossete Bigombe, and her two children were inside her house sleeping. The complainant was awakened

by a loud bang on her door, and using a lamp, she identified the accused, who was 30

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- completely naked. The accused started demanding to have sexual intercourse with \$ \mathsf{S} the complainant. The complainant refused the demand, and upon her refusal, the accused picked the complainant's fork hoe and hit the complainant several times and proceeded to forcefully have sexual intercourse with her without her consent.
- The complainant raised an alarm, which woke up her two children, who rushed to 10 the neighbours to come for rescue of their mother. On hearing them, the accused jumped off the complainant and ran away naked. The accused was identified in his naked state by the complainant's children and neighbours. On entering the complainants house, the complainant was found bleeding and she told the village mates how the accused has assaulted her with a fork hoe and thereafter raped her. 15 The village mates proceeded to the home of the accused and had him arrested. He was taken to Kyezimbire police post and thereafter transferred to Isingiro police station. The accused was charged with rape and at the hearing, upon the indictment being read, the appellant pleaded not guilty to the offence of rape. Following the trial, the trial judge sentenced the accused to twenty years and two months' 20 imprisonment.

Grounds of the Appeal

The appellant filed this appeal on two grounds, namely:

- 1. That the Trial Judge erred in law and fact when he failed to properly 25 evaluate the evidence and convicted the appellant based on contradicting and inconsistent evidence of the prosecution on record, thus reaching a wrong decision thus occasioning a miscarriage of justice.
- 2. That the trial judge erred in law and in fact when he sentenced the accused to 25 years, which is harsh and excessive

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Representation $\mathcal{S}$

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At the hearing of the appeal, Counsel Lydia Ahimbisibwe appeared for the appellant. The respondent was represented by Chief State Attorney, Happiness Ainebyoona, holding brief for Nabaasa Caroline Hope, Principal Assistant Director of Prosecution, who appeared for the respondent. Both the appellant and counsel for the respondent filed written submissions, which were adopted with leave of court. We have studied the record of the lower Court, applicable law, and relevant authorities to this appeal and have applied them in the resolution of the appeal.

Duty of the first Appellate Court

- This being a first appeal, the duty of the first appellate court is to re-appraise all the 15 evidence adduced at the trial and arrive at its own conclusions and draw inferences on questions of law and fact, bearing in mind that it did not see the witnesses testify. (See Kifamunte Henry v Uganda SCCA No. 10 of 1997, The Executive Director of National Environmental Management Authority (NEMA) v Solid State Limited SCCA No. 15 of 2015 (unreported) and Pandya Vs R [1957] EA 336.) 20
- We shall bear the above principles in mind as we resolve this appeal.

Ground 1

Appellant's submissions

It was submitted by the appellant that the prosecution's evidence contained several \$25\$ contradictions and inconsistencies which were ignored or taken lightly by the trial judge as minor issues, yet they were going to the root of the case. That the victim, PW3, in her evidence stated in her evidence that she was raped by the accused. However, PW5 stated that he was informed by the victim (PW3) that the accused had robbed her. The witness also stated that the victim talked to his wife, PW6, when 30

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PW5 was hearing. That it is a major contradiction that the victim informed the $\mathcal{S}$ witness PW6 that she was raped by the accused in the absence of PW5 yet he was one of those that took the victim in the hospital.

The offence which was reported at police was burglary according to PW7, the police officer who got information of the rape from the victim herself. The victim PW3 was issued with PF3, which indicated that the victim sustained injuries on the body but 10 did not sustain injuries on legs, thighs, or in her private parts, and sperms would be visible since the victim was taken to the hospital immediately. Since the victim did not sustain injuries around or in the private parties, this was enough for court to draw an inference and doubt in the prosecution's evidence.

He cited the cases of Auda Hassan Vs Uganda Criminal Appeal No 125 of 2015, 15 court citing the case of Oketch David Vs Uganda SCCA NO. 24 of 2001 held that contradictions and inconsistencies in the prosecution's case which are major and goes to the root of the case should be resolved in favor of the accused. It is the Appellant's submission that the accused was framed and he never committed the offence of rape.

Respondent's submissions

In reply, it was submitted that there were no major contradictions and inconsistencies in the prosecution's case. That from the evidence of PW5, he stated that the victim confided in his wife (PW6) as to what had happened to her on the fateful night. It was the evidence of PW5, that the victim told him, that the appellant had attempted to rape her because there were children, but in the absence of the children she confided in his wife (PW6). PW6, testified that the victim told her that the appellant had raped her. PW6's evidence is further corroborated by the evidence of PW7, who testified that the victim told him that the appellant had raped her. The evidence of

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PW3, PW6 and PW7 is further corroborated by the PF3 which indicates that the appellant sustained multiple injuries on her legs, thighs and private parts which is proof that the victim was raped, and by the appellant who was squarely placed at the scene by the victim (PW3) and PW6. That, whereas the victim told PW5 that the appellant had robbed her, given what the victim had gone through, it was natural that she was comfortable confiding in a fellow woman (PW6). That this was not a major contradiction or inconsistency in the prosecution's case, when all the evidence is analyzed as a whole.

In response to the appellant's submission that the offence which was reported at police was burglary and theft, and not rape, the evidence of PW3 is very clear, that 15 she did not report the case at police. The case was reported that very night, the appellant was arrested by a one Sayuni, while PW3 was admitted to a clinic. That there was no major contradiction or inconsistency in a different offence being reported at police as the evidence of the prosecution was clearly suggestive of rape. That the victim sustaining injuries is not an ingredient to prove the offence of rape 20 and the prosecution has to prove that the sexual act was non-consensual on the part of the victim, which ingredient the prosecution proved in the instant case by sufficient evidence in the PF3 to prove that the victim sustained injuries on the legs, and private parts, which corroborated the victim's evidence, that the appellant was violent to her before raping her. 25

Consideration of ground 1

The appellant contended that the trial Judge erred in law and fact when they relied on prosecution evidence which was tainted with major contradictions and inconsistencies. The main contradiction/inconsistency pointed out by the appellant was that the victim informed PW5 that she had been robbed and later informed PW6

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and PW7 that she was raped. Further that the offence of robbery and theft and not S rape was first reported to the police station. The appellant also stated that his defence of alibi was disregarded by the trial Judge.

The offence of rape is committed by any person who unlawfully has carnal knowledge of a woman or girl above 18 years of age without her consent or if the consent is obtained by force or by intimidation of any kind or by fear of bodily harm or false representations as to the nature of the act or impersonating a husband in case of a married woman. The three essential elements of the offence of rape are:

- a) Carnal knowledge of a woman or girl,
- b) Lack of consent, making it unlawful;
- c) By the accused.

In Joseph Kiiza & Anor. Vs Uganda [1978] HCB, Sexual intercourse at common law, known as carnal knowledge, is penetration of a male organ into that of the female. In Uganda vs Odwong Dennis and Olanya Dickson, [1992-93] HCB 71, it was held that in rape cases the prosecution must prove penetration of the female reproductive organ by the male reproductive organ. According to the record of the lower court, the victim testified on oath that the appellant had sexual intercourse with her. This was corroborated with the testimony of PW6 and PW7.

PW5, in his evidence in chief, testified that the victim told him that the accused had robbed her. In re-examination he testified that the victim told him the accused attempted to rape her because there were children present but in the absence of the children the victim confided to his wife (PW6).

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In arriving at his decision on the inconsistencies in the testimonies of the witnesses, in respect to the act of rape as opposed to the robbery, the trial Judge stated as follows in the Judgment-

"Court has carefully considered the evidence in this case. PW3 was attacked during the night, and she struggled to stop the assailant from having sexual intercourse with her, but unfortunately, she was overpowered by the attacker, who performed an act of sexual intercourse with her. This witness expressly told this court that sexual intercourse was performed on her. The court believes her, considering the fact that she was a mother, she knew what she was talking about. The same witness also confided in PW6 a fellow woman regarding this sexual act performed on her.

I do find that the failure to tell PW5 what exactly happened that night to be explainable as a woman would not easily reveal such an act to a member of the opposite sex, but would readily disclose the same to PW6, a fellow woman. It is therefore the finding of this court that an unlawful sexual act was performed on the complainant in this case, and the prosecution has proved

the first ingredient of this offence beyond a reasonable doubt."

It is clear from the above portion of the Judgment that the trial Judge evaluated the alleged inconsistencies between what the complainant told PW5 and later PW6. We noted that the reporting of the robbery case at the police station was not by the 25 complainant but by another villagemate, Sayuni. The compplaijaint in her statement to the PW7, the police investigating officer clearly stated that she had been raped and not robbed. We find that the trial court properly addressed itself to the apparent inconsistency and evaluated the evidence concerning the first ingredient of rape relating to carnal knowledge of a woman. 30

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On the second ingredient on lack of consent, in *Kibazo vs Uganda*, [1965] EA 507, the Court of Appeal for East Africa held that in a charge of rape the onus is on the prosecution to prove that sexual intercourse took place without the consent of the complainant. According to PW3, the appellant demanded for sexual intercourse and when she refused, he attacked her with a fork hoe and hit her several times before having sexual intercourse with her. This was corroborated by the medical report PF3, on which the victim was examined, indicating that the victim had multiple injuries and bruises at multiple sites consistent with her putting up a form of resistance. We find that the trial Judge properly evaluated evidence that there was no consent from the victim.

Lastly, the appellant's participation is relevant. The appellant was well known to the victim, PW3, who testified during examination in chief that she had known the appellant since they stay in the same village. She stated that she was able to identify him from the lamp. This evidence was corroborated by the evidence of PW6, who is also a resident in the same village and identified the appellant him as he ran naked outside the victim's house, and she stated that there was moonlight.

We have perused through the judgment of the trial Court, and we find that, in assessing the issue of participation of the appellant, it considered the defence of alibi as raised by the appellant. The court was alive to the role of the prosecution in placing the appellant at the scene of crime. The trial judge stated as follows in the Judgment-

"The accused raised the evidence of an alibi, but considering the evidence of PW3 and PW6, the accused was placed at the scene of crime during the material night, and this court does not believe his

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defence of alibi."

We find that the court properly assessed the evidence of placing the appellant at the scene of crime.

Lastly, regarding the issue of proper identification, the trial court found that the circumstances available afforded proper identification of the appellant by the victim. \$10\$ The court took note of the light from the lamp and also took note of the fact that the appellant had known him as being residents of the same village.

We note that all these circumstances satisfy the principles of proper identification laid down in *Abdalla Nabulere & Another vs Uganda*, [2018] UGCA 65. This Court held that;

"The Judge should then examine closely the circumstances in which the identification came to be made, particularly the length of time, the distance, the light, and the familiarity of the witness with the accused. All these factors go to the quality of the identification evidence. If the quality is good the danger of a mistaken identity is reduced but the poorer the quality the greater the danger when the quality is good, as for example, when the identification is made after a long period of observation or in satisfactory conditions by a person who knew the accused before, a court can safely convict even though there is no other evidence to support the identification evidence, provided the court adequately warns itself of the special need for caution."

Considering the principles stated in Abudalla Nabulere (supra), we find that the trial court properly evaluated the evidence concerning the act of unlawful sexual intercourse without consent, identification of the appellant, and consequently, the participation of the appellant. On the facts of the instant case all the conditions favouring correct identification are present We cannot fault the trial Judge.

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This ground lacks merit and therefore, it fails. $\$S\%$

Ground 2

Appellant's submissions

It was submitted by counsel for the that the appellant that the learned trial judge did not consider some of the mitigation factors, the accused stated that he was remorseful and willing to reform. The accused was sentenced to 25 years which is harsh and excessive. He cited the case of Kaggwa John Senyondo vs Uganda Criminal Appeal No. 055 of 20J5 with consideration of other cases the sentence 25 years for rape is harsh and excessive. It was submitted that the sentence of 25 years was harsh and excessive and be substituted with 12 years imprisonment and in the alternative the sentence be set aside and the accused be acquitted

Respondent's submissions

In reply, counsel for the respondent submitted that sentencing is the discretion of the trial judge and an appellate court can only interfere with the sentence of a lower court where in the exercise of its discretion, the court imposes a sentence which is \$20\$ manifestly excessive or so low as to amount to a miscarriage of justice or where the court ignores to consider an important matter or circumstance which ought to be considered while passing sentence or where the sentence imposed is wrong in principle. She cited cases of Kiwalabye Vs Uganda Criminal Appeal No 143 of

2001 as cited in Kawooya Joseph Vs Uganda Criminal Appeal No. 0512 of 2014. \$25\$ The learned trial judge while sentencing the appellant at page 28 para 15-20 of the record of appeal considered both the mitigating and aggravating factors. The learned trial judge considered all mitigating factors and found it fit and justified to sentence the appellant to 20 years' and 4 months' imprisonment in light of the aggravating 30 factors.

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That the learned trial judge while sentencing the appellant considered both the mitigating and aggravating factors and found it fit and justified to sentence the appellant to 20 years' and 4 months' imprisonment. That the appellant's actions deserved a deterrent sentence and the trial Judge, acted with utmost lenience towards the appellant given the barbaric manner in which the appellant executed the crime.

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Consideration of ground 2

We are alive to the fact that we cannot interfere with the sentence imposed by a trial Court unless the exercise of the discretion is such that it results in a sentence that is found to be manifestly excessive or so low as to amount to a miscarriage of justice, or where a trial court omitted to consider an important matter or circumstances which ought to have been considered when passing the sentence, or where the sentence imposed is wrong in principle. In the case of *Kyewalabye Bernard v. Uganda Criminal Appeal No. 143 of 2001*, it was held that;

"The appellant court is not to interfere with sentence imposed by a trial court which has exercised its discretion on sentence unless the exercise of its discretion is such that it results in the sentence imposed to be manifestly excessive or so low as to amount to a miscarriage of justice or where a trial court ignores to consider an important matter or circumstances which ought to be considered when passing the sentence or where the sentence imposed is **wrong in principle.**"

In the instant case, the appellant was sentenced to 20 years and two months in prison. The appellant appealed this sentence on grounds that it was harsh and excessive. We have had an opportunity to peruse the sentencing notes of the learned trial Judge. He stated as follows;

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"It is true the convict is a first offender but he fashions in which he committed this offence was bad. He broke into the complainant's house at night and used all means to have sexual intercourse against the will of the complainant he therefore deserves a deterrent sentence. I would have imprisoned him for 25 years but after deducting the 4 years and 10 months spent on remand he is sentenced to serve in Prison from a Twenty (20) years and (2) Months."

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In our view, the learned trial Judge considered all relevant mitigating and aggravating factors as he was passing sentence. We noted however, that the one point that the trial judge did not consider was the principle of consistency before arriving at the decision to impose the imprisonment term of 20 years and two months upon the Appellant. We are also alive to the decision in **Ogalo s/o Owoura vs R (1954)24* EACA 270*, where the Court added another principle

of consistency in terms of equality before the law so that offences committed under similar circumstances with similar degree of gravity should attract the same range of sentences therefore precedents of the appellate courts are a relevant guiding actor.

It is a good practice for the Court to always set out in the Sentencing Ruling the decided cases which have guided it in arriving at the Sentence in a particular matter. However, failure to cite decided cases does not automatically lead to a nullification of the sentence by the Appellate Court unless it has resulted in a gross miscarriage of justice.

We have considered the following similar cases which passed sentence for rape. In the case of Buterabo Stefano Vs Uganda CACA No. 71 of 2010 judgement delivered on 8th May 2025, this court found a sentence of 25 years' imprisonment for rape not to be harsh and excessive.

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In the case of Anguyo Goerge Vs Uganda CACA No. 0044 of 2014, judgement S delivered on 24th August 2023, this court upheld a sentence of 40 years' imprisonment in a case of Rape.

In the case of Isingoma Joseph Alias Byoma Vs Uganda CACA No. 485 of 2017, this court upheld a sentence of 40 years for rape.

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Given our analysis of the aforementioned authorities and the circumstances of this case, where the appellant raped the victim after assaulting her multiple times using a garden fork hoe, we find that the sentence of 20 years and two months was within the applicable range under the Third Schedule of the Constitution (Sentencing

Guidelines for the Courts of Judicature) (Practice Directions), 2013 and 15 therefore was not harsh or excessive. We find no reason to interfere with it. This ground, therefore fails

We accordingly uphold the decision of the trial court and dismiss this appeal.

It is so ordered

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| Signed, delivered, and dated at Mbarara this day | |

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Moses Kazibwe Kawumi Justice of Appeal

> **Florence Nakachwa Justice of Appeal**

Cornelia Kakooza Sabiiti **Justice of Appeal**

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Prepared on 13 October 2026 · Esheria